135

No. 09-29

FILED
AUG 5 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JAMES D. DOTSON,

Cross-Petitioner,

v.

PFIZER, INC.,

Cross-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

Thomas A. Farr
Counsel of Record
Phillip J. Strach
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
2301 Sugar Bush Road, Suite 600
Raleigh, North Carolina 27612
(919) 787-9700

Counsel for Cross-Respondent

Dated: August 5, 2009

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroup.com

QUESTIONS PRESENTED

Did the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") create a conflict with other circuit courts by denying cross-petitioner's request for front pay?

Even if cross-petitioner had shown an abuse of discretion by the district court, is an alleged misapplication of a properly stated rule of law by the Fourth Circuit grounds for the Court to issue a writ of certiorari?

Did the district court abuse its discretion in denying cross-petitioner's request for front pay?

PARTIES TO THE PROCEEDING
(Rule 14(b))

The names of all the parties to this proceeding in the United States Court of Appeals for the Fourth Circuit are listed in the caption.

CORPORATE DISCLOSURE STATEMENT
(Rule 29.6)

Cross-Respondent PFIZER, INCORPORATED, is a publicly held corporation. It has no parent corporation and there is no publicly traded corporation that holds ten percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING (Rule 14(b)) ii

CORPORATE DISCLOSURE STATEMENT (Rule 29.6) iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED IN THE CASE 3

COUNTER-STATEMENT OF THE CASE 4

Introduction 4

Background 4

ARGUMENT 10

1. The Fourth Circuit applied the legal standard used by all other circuits in holding that the district court did not abuse its discretion in denying Dotson's request for front pay 10

2. Even if cross-petitioner had shown an abuse of discretion by the district court, review should not be granted because any error by the Fourth Circuit in affirming the district court is nothing more than the misapplication of a properly stated rule of law 14

3. The district court did not abuse its discretion in denying Dotson's request for front pay 14

A. The district court reasonably analyzed the facts in fashioning an appropriate equitable remedy 14

B. Dotson's request for front pay was properly denied in light of Pfizer's after-acquired evidence defense 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Abuan v. Level 3 Comms., Inc.,
353 F.3d 1158 (10th Cir. 2003) 11, 12

Barbour v. Merrill,
48 F.3d 1270 (D.C. Cir. 1995) 10

Bartek v. Urban Redev. Auth.,
882 F.2d 739 (3d Cir. 1989) 10

Blum v. Whitco Chemical Corp.,
829 F.2d 367 (3d Cir. 1987) 11

Bruso v. United Airlines, Inc.,
239 F.3d 848 (7th Cir. 2001) 10

Downes v. Volkswagen of Am., Inc.,
41 F.3d 1132 (7th Cir. 1994) 16

Downey v. Strain,
510 F.3d 534 (5th Cir. 2007) 10

E.E.O.C. v. Century Broad. Corp.,
957 F.2d 1446 (7th Cir. 1994) 16

Excel Corp. v. Bosley,
165 F.3d 635 (8th Cir. 1999) 10

Farley v. Nationwide Mut. Ins. Co.,
197 F.3d 1322 (11th Cir. 1999) 10

Gotthardt v. AMTRAK,
191 F.3d 1148 (9th Cir. 1999) 10

Herman v. RSR Sec. Servs. Ltd.,
172 F.3d 132 (2d Cir. 1999) 12

Hybert v. Heart Corp.,
900 F.2d 1050 (7th Cir. 1990) 16

Johnson v. Spencer Press of Me., Inc.,
364 F.3d 368 (1st Cir. 2004) 10

Madden v. Chattanooga City Wide Serv. Dep't,
549 F.3d 666 (6th Cir. 2008) 10

McKennon v. Nashville Banner Pub. Co.,
513 U.S. 352 (1995) 17

Palasota v. Haggar Clothing Co.,
499 F.3d 474 (5th Cir. 2007) 16

Sandlin v. Corporate Interiors, Inc.,
972 F.2d 1212 (10th Cir. 1992) 10

Saulpaugh v. Monroe Cmty. Hosp.,
4 F.3d 134 (2d Cir. 1993) 10

STATUTES

21 U.S.C. § 353, *et seq.* 5

28 U.S.C. § 1254(1) 2

29 U.S.C. § 260 12

29 U.S.C. § 2617(a) 3

29 U.S.C. § 2617(a)(1)(A) 12

29 U.S.C. § 2617(a)(1)(B) 11, 12

RULE

SUP. CT. R. 10 14

PFIZER, INCORPORATED ("Pfizer") respectfully files this brief in opposition to the conditional cross-petition for certiorari filed by the cross-petitioner, JAMES D. DOTSON ("Dotson").

OPINIONS BELOW

The opinion of the Fourth Circuit is published at 558 F.3d 284, and is reprinted in the Appendix to a petition for a writ of certiorari filed by Pfizer in Case No. 08-1479, at 1a-36a. ("Pet. App. ___a-___a"). The Memorandum Opinion of the District Court denying Pfizer's Motion for Judgment as a Matter of Law ("JMOL"), and alternative Motion for a New Trial, is reprinted at Pet. App. 37a-58a. The Memorandum Order of the United States District Court for the Eastern District of North Carolina ("district court") denying Pfizer's motion for summary judgment is reprinted at Pet. App. 59a-93a.

JURISDICTION

The Fourth Circuit decision and order were entered on March 4, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

The statute involved in this case, 29 U.S.C. § 2617(a), states as follows:

> (a) Civil action by employees
>
> (1) Liability
> Any employer who violates section 2615 of this title shall be liable to any eligible employee affected –
>
> . . . .
>
> (B) For such equitable relief **as may be appropriate**, including employment, reinstatement, and promotion.
>
> (emphasis added)

COUNTER-STATEMENT OF THE CASE

Introduction

The Court should deny Dotson's cross-petition for certiorari for the following reasons:

First, the Fourth Circuit found that the district court did not abuse its discretion when the district court denied Dotson's request for front pay. In affirming the district court, the Fourth Circuit applied the standard of review followed by all other circuit courts. Thus, there is no conflict with other circuit courts concerning the standard of review.

Second, even if cross-petitioner had shown an abuse of discretion by the district court, review should not be granted because any error by the Fourth Circuit in affirming the district court is nothing more than a misapplication of a properly stated rule of law.

Finally, the evidence in the record and cited by the district court shows that the district court did not abuse its discretion in denying Dotson's request for front pay.

Background

Pfizer incorporates by reference its statement of background information, contained in its petition for certiorari, in case No. 08-1479. In addition, Pfizer provides this additional statement of facts which is relevant to the district court's denial of

front pay in light of Pfizer's after-acquired evidence defense.[1]

On October 7, 2003, Dotson received his annual business review. His two supervisors, Chris Kennedy and Patrick McElerney, participated in the review. During the review, Dotson admitted to taking starters to Russia and to delivering another set of starters to Dr. Thomas Griggs, Medical Director of the North Carolina State Highway Patrol. Dotson's supervisors instructed him to contact Pfizer's Starter Administration Department for advice regarding his possession of starters.[2] He was also instructed to give Kennedy copies of all paperwork associated with his receipt of starters from two Pfizer sales representatives and his transfers of starters to the Russian orphanage and Dr. Griggs. J.A. at 1054-55, 1678, 2729, 2740.

Dotson then called Pfizer's compliance hotline. On October 9, 2003, Pfizer's Director of Starter Administration, Jim Batura, returned a phone call from Dotson. Batura made a memo of his

---

[1] Dotson's cross-petition asks the Court to reverse the Fourth Circuit's order affirming the equitable remedy crafted by the district court. However, as acknowledged by Dotson, his factual statement focuses almost exclusively on the irrelevant issue of whether Pfizer's reason for firing Dotson was pretextual. Cross-Petition at 4-11.

[2] Pfizer's Starter Administration Department is responsible for monitoring Pfizer's compliance with the Prescription Drug Marketing Act ("PDMA"), 21 U.S.C. § 353, *et seq.* This includes compliance with the guidelines issued by the Food and Drug Administration ("FDA") for the handling and transfer of starters. J.A. at 1838.

conversation with Dotson and recorded the following relevant points:

> Batura advised Dotson that NHO employees were not authorized to handle starters.[3]
>
> Batura advised Dotson that the Company prohibited gifts of corporate property made by individual employees.
>
> Dotson advised Batura that Dotson had received one case of Zithromax from a sales representative named Bridgit Jones and six cases of starters (a combination of Celebrex and Bextra) from a sales representative named Ashley Stalker.
>
> Dotson advised Batura that he had taken the Zithromax to his family pediatrician, Dr. Sharon Foster, and gotten her to sign a starter form accepting the Zithromax from Dotson, that Dotson then told Dr. Foster of Dotson's intentions to take the Zithromax to the Russian orphanage, and that Dr. Foster then returned the Zithromax to Dotson for this purpose.

---

[3] Batura's exchange with Dotson, as well as Dotson's later conversation with Regional Human Resources Director Ann Hodges on October 13, 2003, shows that upper-level managers understood that NHO personnel were not authorized to handle starters. J.A. at 1954, 2151-53.

> Dotson advised Batura that he had taken three cases of Bextra and three cases of Celebrex to Dr. Griggs.
>
> J.A. at 2740-41.

After speaking with Batura, Dotson provided Kennedy and Batura with the forms signed by Jones and Stalker when they gave starters to Dotson, the starter form signed by Dr. Foster for her "receipt" from Dotson of Zithromax, and the starter form signed by Dr. Griggs for his "receipt" from Dotson of **six** cases of starters. J.A. at 2760-64.

Batura received and reviewed the starter forms from Dotson. Based upon the telephone conversation with Dotson and his review of the starter forms provided by Dotson, Batura accepted Dotson's word regarding Dotson's transfer of starters to Dr. Foster and Dr. Griggs. J.A. at 1950, 2760-64.

Prior to the trial of this case, it became obvious that something was wrong with Dotson's story. For instance, the starter form signed by Dr. Foster was dated on October 9, 2003, the same day as Dotson's conversation with Batura, and almost two weeks **after** Dotson had dropped off Zithromax with the Russian orphanage. J.A. at 1956-57. When asked about this discrepancy during his deposition, Dotson claimed for the first time that Dr. John Rusher, and not Dr. Foster, had originally signed for receipt of the starters before Dotson made his first trip to Russia. Dotson then testified that he had lost the starter form signed by Dr. Rusher and had only

sought a replacement form from Dr. Foster. J.A. at 1950-51, 1956-57.

After taking Dotson's deposition, counsel for Pfizer obtained affidavits signed by Dr. Rusher and Dr. Griggs. In his affidavit, Dr. Rusher testified that he recalled seeing medical records for the child ultimately adopted by the Dotson family, but that he did not recall ever discussing a plan for Dotson to take Zithromax to Russia for the orphanage or signing a starter form acknowledging receipt of Zithromax. J.A. at 2985-87. Dr. Griggs testified in his affidavit that he signed the starter form given by Dotson to Batura before Dotson delivered starters to Dr. Griggs' office (and not on September 19 as represented on the form), that Dr. Griggs was not present when the starters were delivered, and that his office had received only **three** cases of starters from Dotson.[4] J.A. at 1318-20, 2991-92. Further, during his deposition, Dotson admitted that he delivered starters to Dr. Griggs' office after normal working hours on September 19, 2003, the day after Hurricane Isabel had immobilized the City of Raleigh, and two days before Dotson went to Russia on September 21, 2003. J.A. at 1070, 1255, 1318-20, 2993-94.

Counsel for Pfizer then provided Batura with Dotson's deposition and the affidavits. Batura concluded that Dotson had made several misrepresentations. J.A. at 1956-57. Contrary to Dotson's disclosures to Batura in October of 2003,

---

[4] Dr. Rusher and Dr. Griggs repeated this testimony at trial in video depositions shown to the jury. J.A. at 355, 363-64, 402, 409-411, 432.

there was no recorded chain of custody showing that a doctor signed for and received Zithromax before Dotson took these starters to Russia. In fact, Dotson lied to Batura by telling him that Dr. Foster had received the Zithromax and returned it to him. J.A. at 2990. Dotson also falsely told Batura that he had delivered three cases of Bextra and three cases of Celebrex (or a total of six cases) to Dr. Griggs. J.A. at 1956. Dotson repeated this misrepresentation when he sent Batura a starter form that falsely represented receipt of six cases of starters by Dr. Griggs on September 19, 2003, instead of the three cases actually received by Dr. Griggs' office. J.A. at 1318-20, 2991-92, 2767. Based upon Batura's recommendation, on September 25, 2005, Pfizer reported these misrepresentations to the FDA. J.A. at 2774.[5]

Dawn Rogers, Pfizer's Human Resources Vice President, testified at trial that Dotson would have been terminated based on the new evidence acquired by Pfizer during Dotson's deposition and afterwards. J.A. at 2287-88.

---

[5] Batura did not initially recommend that Pfizer report Dotson to the FDA because Batura accepted Dotson's word that Dr. Foster and Dr. Griggs had both signed for and received starters. J.A. at 1086, 1955-56.

ARGUMENT

1. The Fourth Circuit applied the legal standard used by all other circuits in holding that the district court did not abuse its discretion in denying Dotson's request for front pay.

The Fourth Circuit reviewed the decision of the district court denying an award of front pay to Dotson for an abuse of discretion. Pet. App. 24a. Based upon its review of the evidence and the reasoning of the district court, the Fourth Circuit concluded that the district court had not abused its discretion in denying Dotson's request for front pay. Pet. App. 24a-27a. This legal standard of review used by the Fourth Circuit is the same standard followed by every other circuit court. *See, e.g.*, *Johnson v. Spencer Press of Me., Inc.*, 364 F.3d 368, 384 (1st Cir. 2004); *Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993); *Bartek v. Urban Redev. Auth.*, 882 F.2d 739, 746 (3d Cir. 1989); *Downey v. Strain*, 510 F.3d 534, 544 (5th Cir. 2007); *Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 679 (6th Cir. 2008); *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 861 (7th Cir. 2001); *Excel Corp. v. Bosley*, 165 F.3d 635, 640 (8th Cir. 1999); *Gotthardt v. AMTRAK*, 191 F.3d 1148, 1156 (9th Cir. 1999); *Sandlin v. Corporate Interiors, Inc.*, 972 F.2d 1212, 1214 (10th Cir. 1992); *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1338 (11th Cir. 1999); *Barbour v. Merrill*, 48 F.3d 1270, 1277-78 (D.C. Cir. 1995).

Dotson's cross-petition fails to identify any decision by any circuit court that applies a different standard of review. Thus, Dotson's argument that the Fourth Circuit's decision creates a circuit conflict lacks any foundation. Nor does Dotson's cross-petition address the "abuse of discretion" standard of review or explain how the district court abused its discretion.

Dotson's cross-petition overlooks the statutory discretion given to district courts to award "equitable relief **as may be appropriate**, including employment, reinstatement, and promotion." 29 U.S.C. § 2617(a)(1)(B) (emphasis added). The FMLA expressly grants district courts the authority to decide what type of equitable relief is or is not appropriate in a particular case. "Employment, reinstatement, and promotion" are all **potential** components of the sum total of overall relief that may be awarded to a successful plaintiff-employee. The Fourth Circuit correctly recognized the broad discretion given to district courts. Equitable remedies are plainly an element of the overall relief that a district court may or may not award in the exercise of its discretion. Pet. App. 24a-27a.

Many of the cases cited by Dotson involve claims or legal issues that are completely different from those raised by the cross-petition. For example, *Blum v. Whitco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987), cited three times by Dotson, involves an award of front pay by a jury not a judge. *Abuan v. Level 3 Comms., Inc.*, 353 F.3d 1158, 1179-80 (10th Cir. 2003), involves a district court's failure to

calculate two years of front pay at a higher wage rate the plaintiff would have received but for discrimination by the defendant in the area of promotions.[6] *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999), addresses the standards applicable to a "good faith" defense to an award of liquidated damages under the Fair Labor Standards Act, 29 U.S.C. § 260, not a district court's discretion to consider a large award of liquidated damages in connection with a claim for front pay.

Rather than focus on the applicable standard of review, Dotson manufactures a distinction between so-called "retrospective" and "prospective" relief under the FMLA. There is no support for such a distinction in the text of the FMLA. Instead, section 2617(a)(1)(A) of the FMLA describes *economic* damages available under the Act while section 2617(a)(1)(B) describes *equitable* remedies the district court "**may**" award if "**appropriate**" (emphasis added).

Moreover, nothing in the statute supports Dotson's contention that the district court was prohibited from considering the economic damages awarded when determining whether to award the equitable remedy of front pay. The text of the

---

[6] Dotson's cross-petition neglects to explain that the Tenth Circuit in *Abuan* affirmed the district court's decision to end front pay after two years in part because of the length of time the district court concluded it would take the plaintiff to find a job. *Abuan*, 353 F.3d at 1179. Similarly, the decision by the district court in this case to reject a request for fifteen years of front pay cannot be an abuse of discretion given the other factors cited by the district court. Pet. App. 24a-27a.

statute – allowing equitable relief "**as may be appropriate**" – in fact supports a contrary conclusion, i.e., that the discretion of the district court is the touchstone of Congressional intent (emphasis added).

Furthermore, none of the cases cited by Dotson adopt the terms "retrospective relief" or "prospective relief" as separate or distinct remedies. Nor do the cases state that a district court abuses its discretion if it considers the totality of the overall remedy, including the amount of liquated damages, in fashioning the extent of relief needed to make "wronged employees whole" in a given case. Pet. App. 27a.

Dotson admits that the "fundamental remedial purpose of the FMLA is to make successful plaintiff-employees whole." Cross-Petition at 3. However, Dotson wishes to avoid the discretion given to district courts in favor of a manufactured distinction between so-called prospective and retrospective remedies. Because every circuit agrees with the Fourth Circuit that a district court's order regarding appropriate equitable relief should be reviewed only for an abuse of discretion, Dotson's conditional cross-petition should not be granted.

2. Even if cross-petitioner had shown an abuse of discretion by the district court, review should not be granted because any error by the Fourth Circuit in affirming the district court is nothing more than the misapplication of a properly stated rule of law.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In finding that the district court did not abuse its discretion by denying Dotson's request for front pay, the Fourth Circuit applied a properly stated rule of law. Dotson has failed to show anything that is unusual or extraordinary regarding his legal arguments that would justify the Court's suspension of its normal practices under Rule 10. Thus, even assuming the Fourth Circuit misapplied a properly stated rule of law, or if the Fourth Circuit based its ruling on alleged erroneous factual findings by the district court, review should not be granted.

3. The district court did not abuse its discretion in denying Dotson's request for front pay.

A. The district court reasonably analyzed the facts in fashioning an appropriate equitable remedy.

Dotson's Petition wrongly contends that the district court declined to award front pay solely because of the district court's award of liquidated

damages. Cross-Petition at 19. In truth, the amount of liquidated damages was only *one* of several factors considered by the district court.

First, the district court denied Dotson's request on the grounds that a lifetime award was too speculative. Pet. App. 25a, 47a, 48a. The district court found (1) that the determination of front pay is inherently speculative; (2) that Dotson was of a relatively young age; (3) that Dotson was highly educated; and (4) that his request for front pay from the date of the jury verdict until retirement covered a span of fifteen years. Pet. App. 26a, 27a, 47a.[7] Further, at the time the district court ruled on the request for front pay, the district court relied on the fact that Dotson already had secured comparable, if not equivalent, employment. Pet. App. 26a, 49a. Based upon the district court's reasoned review of these various factors, the Fourth Circuit correctly affirmed that the district court's decision to deny front pay was not an abuse of discretion. Pet. App. 26a.

Dotson contends that the district court was wrong to even contemplate "the amount of retrospective relief awarded in the form of liquidated damages." Cross-Petition at 3. The Fourth Circuit properly rejected this argument and observed that "if, as [Dotson] argues, the remedial intent of the

---

[7] Dotson cites to his own testimony to argue that he was "vested" in an annuity that would be worth $1.37 million, provided he remained with Pfizer until he retired. Cross-Petition at 4; J.A. at 2626DD-EE. The district court obviously addressed this argument by concluding that it was too speculative to assume that Dotson would remain with Pfizer for fifteen more years. Pet. App. 47a.

FMLA is to make wronged employees whole, it is difficult to understand why a lower court cannot consider the role of liquidated damages in reaching this over-arching goal." Pet. App. 27a.

Other circuits have agreed that an award of liquidated damages may be considered in determining the extent of equitable relief provided by the district court, including whether to award front pay. *Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 490-91 (5th Cir. 2007); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994). Thus, "a substantial liquidated damages award strengthens the court's judgment that [the plaintiff] has already been made whole." *Hybert v. Heart Corp.*, 900 F.2d 1050, 1056 (7th Cir. 1990) (citations omitted). In fact, in a case cited by Dotson, *E.E.O.C. v. Century Broad. Corp.*, 957 F.2d 1446, 1464 (7th Cir. 1994), the Seventh Circuit endorsed the district court's consideration of liquidated damages in determining whether to award front pay.

Absent Pfizer's after-acquired evidence defense, see *infra*, another district court might have exercised its discretion to award Dotson some measure of front pay. However, this is not a case where the district court denied front pay **solely** because of an award of liquidated damages without any other explanation. *See Palasota*, 499 F.3d at 491. Instead, the district court in this case reviewed numerous factors in addition to the large award of liquidated damages. While Dotson may disagree with the district court's analysis of the evidence, the district court did not abuse its discretion to fashion appropriate equitable relief.

B. Dotson's request for front pay was properly denied in light of Pfizer's after-acquired evidence defense.

Front pay is not an appropriate remedy when an employer establishes an after-acquired evidence defense. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 361-62 (1995). During the trial, Pfizer offered extensive evidence that Dotson engaged in conduct that would have resulted in his discharge regardless of his adoption-related leave. Pet. App. 20a-23a.[8]

Counsel for Pfizer argued to the jury that back pay should start from the time of Dotson's termination (December 2003) and then be cut off no later than September 23, 2005, the date on which Pfizer reported Dotson to the FDA. J.A. at 2774-75. Accordingly, assuming the jury accepted Pfizer's position, it would have cut off Dotson's backpay after twenty-two months. (December 2003 through September 2005). Multiplying Dotson's requested monthly back pay award times 22 months yields a result of $331,429.2665.[9] This result is essentially identical to the amount of backpay awarded by the

---

[8] The district court rejected Pfizer's requested item on the verdict form specifically requiring the jury to answer whether it had found for Pfizer on this point. J.A. at 686.

[9] During his closing argument, counsel for Dotson asserted that Dotson's full back pay award would be $451,949.00. Dividing Dotson's requested back pay award ($451,949.00) by 30 (the total number of months for which Dotson would otherwise have been entitled to back pay – December 2003 through the time of trial in May 2006), yields $15064.96666 per month of back pay.

jury and demonstrates that the jury found for Pfizer on its affirmative defense. Pet. App. 7a.

Neither the district court nor the Fourth Circuit expressly ruled on Pfizer's after-acquired evidence defense. However, both courts acknowledged the connection between Pfizer's defense and the amount of back pay awarded by the jury. Pet. App. 20a-23a, 50a, 54a. The Fourth Circuit's extensive discussion of Pfizer's defense provides additional and strong support for its affirmance of the district court.

CONCLUSION

For the foregoing reasons, Pfizer respectfully requests this Court to deny Dotson's conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

/s/ Thomas A. Farr
Thomas A. Farr
Counsel of Record
Phillip J. Strach
OGLTREE, DEAKINS, NASH
SMOAK & STEWART, P.C.
2301 Sugar Bush Road, Suite 600
Raleigh, North Carolina 27612
(919) 789-3179

Counsel for Cross-Respondent